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No. 87-609

In the Supreme Court of the United States

OCTOBER TERM, 1987

SHELL OIL COMPANY,
Appellant,

vs.

DIRECTOR OF REVENUE OF MISSOURI,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Missouri on the ground that the appeal does not present a substantial federal question.

I

THE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. The Statutes

This appeal raises the question of the validity of §§ 66.600 to 66.635, RSMo 1978, and Cum. Supp. 1984, statutes authorizing St. Louis County, Missouri, to adopt an ordinance imposing a countywide sales tax, and §§ 94.600 to 94.655, RSMo 1978 and Cum. Supp. 1984, statutes authorizing St. Louis County to impose a sales tax for trans-

portation purposes.[1] The text of the pertinent statutes is set forth in the Appendix.

B. The Proceedings Below

The Missouri Director of Revenue (hereinafter referred to as Director) assessed appellant for St. Louis County sales tax and St. Louis County transportation sales tax for the period March 1, 1978, through February 28, 1981. The basis of the assessment was appellant's sales of aviation fuel at the Lambert-St. Louis International Airport located in St. Louis County, Missouri.

On March 24, 1982, appellant filed a complaint with the Missouri Administrative Hearing Commission, alleging that the assessment should be set aside because it had no place of business in St. Louis County. The Missouri Administrative Hearing Commission upheld the tax assessment and on April 28, 1986, appellant filed its petition for review of the Administrative Hearing Commission decision with the Missouri Court of Appeals, Western District. After briefing and oral argument, the Missouri Court of Appeals, Western District, transferred the case to the Supreme Court of Missouri on jurisdictional grounds.

The Supreme Court of Missouri, in a four to three decision, upheld the Director's assessment of county sales and transportation sales taxes against appellant. *Shell Oil Company v. Director of Revenue*, 732 S.W.2d 178 (Mo. banc 1987). The Supreme Court of Missouri found that appellant's argument regarding "place of business" was misdirected and held that a sale at retail occurred in St.

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1. For ease of reference and consistency, appellee will cite the same version of Missouri statutes as has the appellant even though the pertinent portions were unaffected by amendments to the Missouri statutes which are codified in the 1986 statutory revision.

Louis County when Shell, through its arrangement with Amoco Oil and its contracts with airlines, delivered the aviation fuel and passed title to the purchasers and ultimate users, the airlines.

The Supreme Court of Missouri also rejected appellant's argument that the St. Louis County sales and transportation sales taxes violated Article I, § 8, Clause 3 of the United States Constitution, the Commerce Clause. The court found that the transactions in question were totally *intrastate* in character; therefore, no burden on interstate commerce existed. The court further found that the sales of aviation fuel by appellant were inextricably linked to St. Louis County by appellant's continuing presence at Lambert Field. Through the arrangements Shell has with Amoco Oil to use the Amoco meter at Lambert Field and through the delivery of the fuel and passage of title at that meter, appellant fulfills its contracts with the airlines who operate there.

Contrary to appellant's contention in its statement of jurisdiction that it paid state use tax, the actual wording of the stipulation between the parties was that Shell has paid and no controversy exists with respect to state sales or use taxes on the sales in question. The Supreme Court of Missouri found that the intrastate character of the sales of aviation fuel was such that the sales were subject to Missouri *sales tax* and consequently, the county sales and transportation sales taxes which incorporate the statutory limitations of the state sales tax.

The Supreme Court of Missouri also rejected appellant's equal protection argument for similar reasons.

II

ARGUMENT

A.

The Case Presents No Substantial Question For Review Or Decision By This Court

In its statement of jurisdiction, appellant argues that the St. Louis County sales and transportation sales taxes assessed against it by the Director of Revenue are an impermissible burden on interstate commerce. Consistent with its version of the facts, appellant argues that the four-part test of *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977), is not met, thereby rendering the taxes an impermissible burden on interstate commerce. In addition, appellant claims it is deprived of due process and denied equal protection.

State taxation on the "privilege of doing business" is not per se unconstitutional when applied to interstate commerce. *Complete Auto Transit, Inc. v. Brady, supra.* Interstate commerce must carry its fair share of the state tax burden. *Department of Revenue v. Association of Washington Stevedoring Companies,* 435 U.S. 734 (1978).

Pursuant to appellant's version of the facts, Shell is operating in interstate commerce in making sales of aviation fuel in the state of Missouri. The facts actually show that the transactions in question are *intrastate* in character and render appellant subject to Missouri sales tax and St. Louis County sales and transportation sales taxes.

The Supreme Court of Missouri was correct in ruling that the sales in question are entirely consummated in St. Louis County. The stipulated facts show that appel-

lant and each airline enter into a "contract for sale" for an estimated annual gallonage of aviation fuel. These contracts are contracts for future sales and no delivery of the fuel takes place pursuant to these contracts. Appellant has an "exchange" agreement with Amoco Oil contemplating a transaction to occur at Lambert Field, St. Louis County, Missouri. Appellant expects Amoco to deliver fuel to the meter at Lambert Field for sale on site from the meter. Upon arriving at Lambert Field, the fuel passes through the Amoco meter and at that moment, title to the fuel passes to Shell. Subsequently appellant transfers title to the fuel to each airline. Appellant bills each airline based on statements received from Allied Aviation, the storage service. Statements from Allied are based upon data gathered at the meter site. The transfer of title to the aviation fuel from Amoco to Shell and then from Shell to each airline is done pursuant to the agreement allowing Shell to use Amoco's meter at Lambert Field as a site for its sale to each respective airline. Therefore, the sale at retail is consummated at the meter site entirely within St. Louis County. No interstate commerce or interstate transportation is involved in the sale.

County sales and transportation sales taxes are taxes for the privilege of engaging in the business of selling tangible personal property or rendering taxable services at retail. Section 66.605, RSMo 1978, and § 94.610, RSMo 1978. As such, these taxes are not in violation of the Commerce Clause because the transactions forming the sales at retail are consummated wholly within the state of Missouri and do not involve interstate commerce or interstate transportation.

Regardless of the fact that Shell is a large multinational corporation doing business in a number of states

within this country. Shell is still responsible for taxes assessed on its local intrastate transactions and activities. Shell cannot shade its local activities by cunning agreements with other oil companies, airlines, and storage facilities.

The Supreme Court of Missouri correctly upheld the assessment of the tax.

III

CONCLUSION

Wherefore, appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and appellee respectfully moves this Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Missouri.

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APPENDIX

§ 66.600, RSMo 1978:

> **County sales tax authorized, when—form of ballot—rate—use of brackets authorized (St. Louis county).**—1. The governing body of any county of the first class having a charter form of government and not containing a city with a population of four hundred thousand or more may, by adopting an ordinance, impose a countywide sales tax for the benefit of both the incorporated and the unincorporated areas of the county; provided, however, that no ordinance enacted pursuant to the authority granted by the provisions of sections 66.600 to 66.635 shall be at variance with the provisions as set forth in sections 66.600 to 66.635; . . .

§ 66.605, RSMo 1978:

> **Taxable transactions (St. Louis county).**—The ordinance imposing the county sales tax under the provisions of sections 66.600 to 66.635 shall impose upon all sellers a tax for the privilege of engaging in the business of selling tangible personal property or rendering taxable services at retail to the extent and in the manner provided in sections 144.010 to 144.510, RSMo, and the rules and regulations of the director of revenue issued pursuant thereto; except the rate of the tax shall be the one percent imposed by the ordinance as the county sales tax. . . .

§ 66.610, RSMo Cum. Supp. 1984:

Director of revenue to collect tax for county (St. Louis County).—After the effective date of any tax imposed under the provisions of sections 66.600 to 66.635, the director of revenue shall perform all functions incident to the administration, collection, enforcement, and operation of the tax, and the director of revenue shall collect in addition to the sales tax for the state of Missouri the additional tax authorized under the authority of sections 66.600 to 66.635. . . .

§ 66.615, RSMo Cum. Supp. 1984:

Tax to be imposed and collected in same manner as state tax (St. Louis County).—1. The following provisions shall govern the collection by the director of revenue of the tax imposed by sections 66.600 to 66.635:

(1) All applicable provisions contained in sections 144.010 to 144.510, RSMo, governing the state sales tax and section 32.057, RSMo, the uniform confidentiality provision, shall apply to the collection of the tax imposed by sections 66.600 to 66.635, except as modified in sections 66.600 to 66.635. . . .

5. For the purposes of a sales tax imposed by an ordinance pursuant to sections 66.600 to 66.635, all retail sales shall be deemed to be consummated at the place of business of the retailer except for (1) tangible personal property sold which is delivered by the retailer or his agent to an out-of-state destination or to a common carrier for delivery to an out-of-state destination and (2) except for the sale of motor vehicles which is provided for in section 66.630. In the event

a retailer has more than one place of business in this state which participates in the sale, the sale shall be deemed to be consummated at the place of business of the retailer where the initial order for the tangible personal property is taken, even though the order must be forwarded elsewhere for acceptance, approval of credit, shipment or billing. A sale by a retailer's employee shall be deemed to be consummated at the place of business from which he works.

§ 94.600, RSMo Cum. Supp. 1984:

Definitions.—The following words, as used in section 94.600 to 94.655, shall have the following meaning unless a different meaning clearly appears from the context:

(1) **"City"** shall mean any city not within a county, any city of over four hundred thousand inhabitants wholly or partially within a first class county, and any first class county operating under a charter form of government and not containing a city or part of a city of over four hundred thousand inhabitants; . . .

§ 94.605, RSMo Cum. Supp. 1984:

Tax, how imposed—rate of tax—ordinance, notice and contents—tax effective, when—boundary changes, procedure—brackets for tax rate authorized.—1. Any city not within a county, any first class county operating under a charter form of government and not containing a city or part of a city of over four hundred thousand inhabitants, and any city of over four hundred thousand inhabitants wholly or partially within a first class county,

may by a majority vote of its governing body impose a sales tax for transportation purposes enumerated herein.

2. The sales tax may be imposed at a rate not to exceed one-half of one percent on the receipts from the sale at retail of all tangible personal property or taxable services at retail within any city adopting such tax, if such property and services are subject to taxation by the state of Missouri under the provisions of sections 144.010 to 144.510, RSMo. . . .

§ 94.610, RSMo 1978:

Ordinance, required provisions in.—The ordinance imposing a sales tax under the provisions of sections 94.600 to 94.655 shall impose upon all persons in such city who are engaged in the business of selling tangible personal property and taxable services subject to a sales tax under the provisions of sections 144.010 to 144.510, RSMo, a tax for the privilege of engaging in such business at the rate imposed by said ordinance and in the manner and to the extent provided in sections 144.010 to 144.510, RSMo, and the rules and regulations of the director of revenue issued pursuant thereto. . . .

§ 94.615, RSMo 1978:

Director of revenue, duties of—tax, how collected and reported.—On and after the effective date of any tax imposed under the provisions of sections 94.600 to 94.655, the director of revenue shall perform all functions incident to the administration, collection, enforcement, and operation of the tax, and

the director of revenue shall collect in addition to the sales tax for the state of Missouri and any city sales tax imposed by sections 94.500 to 94.570, where applicable, the additional tax authorized under sections 94.600 to 94.655. . . .

§ 94.620, RSMo 1978:

Collection procedure — confidentiality, exceptions — exemptions — certificates — presumptions — penalties. — 1. The following provisions shall govern the collection by the director of revenue of the tax imposed by sections 94.600 to 94.655:

(1) All applicable provisions contained in sections 144.010 to 144.510, RSMo, governing the state sales tax . . . shall apply to the collection of the tax imposed by sections 94.600 to 94.655, except as modified in sections 94.600 to 94.655. . . .

5. For the purposes of a sales tax imposed by an ordinance pursuant to sections 94.600 to 94.655, all retail sales shall be deemed to be consummated at the place of business of the retailer unless the tangible personal property sold is delivered by the retailer or his agent to an out-of-state destination or to a common carrier for delivery to an out-of-state destination. In the event a retailer has more than one place of business in this state which participates in the sale, the sale shall be deemed to be consummated at the place of business of the retailer where the initial order for the tangible personal property is taken, even though the order must be forwarded elsewhere for acceptance, approval of credit, shipment or billing. A sale by a retailer's agent or employee shall be deemed to be consummated at the place of business from which he works.

§ 144.010, RSMo Cum. Supp. 1984:

> **Definitions—rules suspension and reinstatement—procedure.**—1. The following words, terms, and phrases when used in sections 144.010 to 144.510 have the meanings ascribed to them in this section, except when the context indicates a different meaning: . . .
>
> (8) **"Sale at retail"** means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration; . . .

§ 144.020, RSMo Cum. Supp. 1984:

> **Rate of tax.**—1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. . . .